

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 1621 OF 1984

Date of Decision: 02-09-1996

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AHMEDABAD COOPERATIVE DEPARTMENTAL STORES LTD.
VS
UNION OF INDIA

Appearance:

Mr. G.N. Desai for the petitioner
None present for respondents.

Coram: S.K. KESHOTE, J
(2-9-1996)

ORAL JUDGMENT:

The petitioner, a cooperative Society registered under the provisions of the Gujarat Cooperative Societies Act, 1961 has filed this petition challenging the order of the Regional Provident Fund Commissioner, Gujarat State, Ahmedabad, dated 8-11-1983 under which it has been held that the employees engaged by the counter-holders (licensees) in the premises of the establishment do represent the establishment and they do fall in the category of employees

covered under section 2(f) of the Employees Provident and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"). The petitioner -establishment runs Apna Bazar wherein different persons were given out counters. The respondents treated the employees who were working in the aforesaid counters as the employees of the petitioner establishment and issued notice comply with the provisions of the Act in respect of the employees engaged by the counter-holders. The petitioner contended before the authority that those are not the employees of the petitioner under section 2(f) of the Act and as such the petitioner cannot be held to be the principal employer of those workmen and no contribution can be asked from the petitioner. This contention did not find favour with the authority and under the impugned order the employees engaged by the counter holders were held to be covered under the provisions of Section 2(f) of the Act. Hence this special civil application.

2. Learned counsel for the petitioner contended that the establishment of the petitioner is not covered under section 16 of the Act. The petitioner is an establishment registered under the Cooperative Societies Act. It employs less than 50 persons without the aid of power and as such it is not covered by the Act. He has further submitted that the petitioner has a remedy of approaching the Central Government under the provisions of section 19(f) of the Act. It has next been contended that the employees engaged by the counter holders are not the employees of the petitioner and they do not fall under section 2(f) of the Act. The counters have been taken on licence by the counter holders and they are doing their own business and the petitioner charges them some amount for providing part of the premises for doing business.

3. I have given my thoughtful consideration to the contention raised by the learned counsel for the petitioner. The contention that the petitioner- establishment is not covered under section 16 of the Act has not been raised by the petitioner before the Regional Provident Fund Commissioner. Not only this, the petitioner has not raised this contention in the special civil application also. Establishments registered under the Cooperative Societies Act which employs less than 50 persons and working without the aid of power may or may not be excluded from applicability of the Act as it is to be raised before the authority and to be decided by it. It is a question of fact as to how many employees are engaged by the petitioner and whether it is working with or without the aid of power. This plea has not been raised by the petitioner. Only when it is established that the petitioner has not employed more

than 50 workers and it is working without the aid of power, the petitioner may get out of the purview of the Act, but not otherwise. The petitioner has not raised this material issue before the respondent and as such there was no occasion for the respondent to decide the said question. This Court sitting under Article 227 of the Constitution of India will not permit to raise a new point which has not been taken before the lower authority. The Court has to consider the legality, propriety and correctness of the impugned order as it stood. Error apparent on the face of the order has to be pointed out on the basis of material produced and the grounds raised, and not by raising some new plea or ground or both. In view of this fact, this plea raised by the petitioner is not available. Otherwise also no material is produced on record by the petitioner to show and establish that the establishment does not fall under the Act. The first contention of the learned counsel for the petitioner is therefore devoid of any substance.

4. The second contention raised by the learned counsel for the petitioner is that it has remedy under section 19 of the Act to approach the Central Government. Suffice it to say then, why did the petitioner approach this court in the year 1984. If that remedy was available the petitioner should have availed of the same. This court is not dismissing the petition on the ground of availability of remedy under section 19 of the Act. On the contrary the counsel for the petitioner is desirous of having decision on merits. The petitioner has enjoyed the fruits of the interim relief granted in his favour by this court for about 12 years. The matter would have been different if the petitioner desired to avail of the remedy provided elsewhere initially, but it is a different matter now for the petitioner to pray for resorting to such remedy which was available to it all the time. The contention raised by the learned counsel for the petitioner is difficult to appreciate except to say that the petitioner wanted to avoid decision on merits from this court and it wanted to take further chance. This conduct itself is sufficient for rejection of the second contention raised by the learned counsel for the petitioner.

5. Now I may refer to the last contention raised by the learned counsel for the petitioner. Section 2(f) of the Act defines employees, which reads as under:

"2(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any

persons--

- (i) employed by or through a contractor in or in connection with the work of the establishment;
- (ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment;"

The Act is a beneficial piece of legislation aimed at promoting and securing the well being of employees and the court will not adopt narrow interpretation which will have the effect of defeating the very object and purpose of the Act. The definition of 'employee' is sufficiently wide enough and it covers all persons employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment. It has further been provided that the person may get his wages directly or indirectly from the employer. The definition also includes any person employed by or through a contractor in or in connection with the work of the establishment. Definition of 'employee' under the Act is completely different from the definition of worker and workman respectively in the Factories Act and the Industrial Disputes Act. The Supreme Court in the case of P.M.Patel vs. Union of India, 1986(1) SCC pg.32 held that the terms of definition of "employee" are wide. They include not only persons directly employed by the employer but also those employed through the contractor. They include not only those employees in the factory but also those employed in connection with the work of the factory. The question whether employer-employee relation existed between the parties came up for consideration before the Supreme Court in the case of Silver Jubilee Tailoring House vs. Chief Inspector of Shops and Establishments, AIR 1974 SC 37. It was held that for the purpose of deciding the question of relationship of master and servant, the test of control over the manner of work is unrealistic, that in its application to skilled and particularly professional work, the control test in its traditional form has really broken down, that the control test cannot be treated as the exclusive test, and that the search for a formula in the nature of a single test to tell a contract of service from a contract for service might not serve any useful purpose. The utmost that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. The court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. Control is no longer the decisive factor in every case. This court in the case of Satish Plastics vs. R.P.F., 22 GLR 686, held that the definition of 'employee' as it contained in section 2(f) of the Act was wide enough to take within its sweep a person permitted to work at his residence as well and further that even if a person was not

wholly employed, but was principally employed in connection with the business of the shop, he would be a person employed within the meaning of the statutory language.

6. The facts which have come on record of this case are that in the agreement executed by the establishment and the counter holders before giving licence inter alia provides for conditions reserving control of establishment on the (i) prices of the products, (ii) credit of sale proceeds in establishment's account, (iii) storage of goods of the licensees in the main godowns of the establishment and its supply on special indent, (iv) the issue of bill on the bill book of the establishment, (v) fixation of working hours by the establishment, (vi) issue of advertisement regarding sale of goods through the establishment only, and (vii) quality control by the establishment. The objects of the establishment as contained in the byelaws are also to be referred. Some of the main objects of the establishment are as under:

- "(i) to undertake import of consumer goods and function as Agent of Government and State undertakings for the distribution of controlled rationed scarce or other commodities;
- (ii) to supervise the working of affiliated Societies;
- (iii) to enter into contracts or agreements for the purpose of sale or distribution of consumer goods either by itself or through agency of other affiliated cooperatives on outright basis or commission, consignment on agency basis;
- (iv) to allow affiliated societies to operate and sell consumer goods either on behalf of the department stores or on an agency basis or at their own risk on the premises or shops or branches of the department stores subject to such written agreements as the Board of Directors may determine;
- (v) to sell or supply or distribute consumers goods on trade credit in accordance with the rules approved by the Board."

Under the objects the establishment is competent to enter into contracts or agreements for the sale or distribution of consumer goods either by itself or through agency of other affiliated cooperative or outright basis, commission, consignment on agency basis, etc., The petitioner has not raised any issue that the holders of the counters and the persons working therein are not engaged in the work or in

connection with the work of the establishment. The counter holders were put to conditions and reading thereof clearly gives out that in sum and substance the sale of the products was from the Apna Bazar as it is sold by the petitioner itself. It appears to be a case where the counter holders were getting some commission on the sale made by them. Otherwise, if it would have been a case as given out by the petitioner, then what for the condition of issuance of bill on the bill book of the establishment and issue of advertisement through the establishment only and crediting the sale proceeds in the account of the establishment was imposed. The petitioner has not brought on record the agreement which has been entered into between the petitioner and the counter holders, but the counsel for the petitioner has not disputed that there was condition that the bills are to be issued on the bill book of the establishment and the sale proceeds on the counter have to be credited to the establishment's account. Coupled with those conditions, fixation of hours of working and the establishment having control on storage of goods of the licensees in the main godown of the establishment and its supply on special indents, conclusively prove that it was the case where the counter holders were working as agents or contractors who are getting their commission for the sale of consumer articles of the establishment. In case it would have been a case of providing space only to the licence holders for sale of consumer goods, then those conditions would not have been there and no body would have accepted the same. The case would have been of payment of licence fees and not of crediting of sale proceeds in the account of the establishment, and issue of bill on the bill book of the establishment. The fact that the sale proceeds were to be credited to the establishment's account conclusively proves that the goods were of the establishment itself. Secondly, the goods were to be kept in the main godowns of the establishment and its supply were to be on special indents further prove and establish that it was some arrangement of commission agency or contract. In view of the facts which have come on record I do not find any illegality in the order which has been made by the respondent which calls for interference of this court sitting under Article 226 of the Constitution of India.

7. In the result this special civil application fails and the same is dismissed. Rule discharged. Ad interim relief granted earlier by this court stands vacated. No order as to costs.

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